Supreme Court, U.S.
FILED
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No. 00-___

In The

Supreme Court of the United States

SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND ATTORNEY GENERAL OF NEW YORK,

Cross-Petitioners,

v.

MARTIN H. TANKLEFF,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this Conditional-Cross-Petition involves the jurisdiction of the Circuit Court to have entertained Tankleff's appeal. It is:

> Whether the Circuit Court had jurisdiction to consider Tankleff's appeal when that Court erroneously decided that the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA) did not govern issuance of the certificate of appealability. The Circuit Court's decision is directly at odds with this Court's decision in *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

LIST OF PARTIES

The parties to the proceeding below were:

The Superintendent of Clinton Correctional Facility, Cross-Petitioner;

The Commissioner, New York State Department of Correctional Services, Cross-Petitioner;

The Attorney General of the State of New York, Cross-Petitioner; and

Martin H. Tankleff, Cross-Respondent.

OPINION BELOW

On February 25, 1997 the District Judge issued a certificate granting Tankleff permission to appeal to the Second Circuit Court of Appeals. There was a disagreement whether the document was a certificate of probable cause or a certificate of appealability. This question was argued in the appeal and the Circuit Court decided that Tankleff required only a certificate of probable cause eve though the application for permission to appeal postdated the effective date of the AEDPA. *Tankleff v. Senkowski*, 135 F.2d 235, 241-42 (2d Cir. 1998). The Memorandum and Order granting the certificate of probable cause/appealability is found at J.A. 3787-3791 and is reprinted in the Appendix.

JURISDICTION

This Court has jurisdiction to consider this Conditional Cross-Appeal pursuant to 28 U.S.C. § 1254(1) and Rules 12 and 13 of the Rules of the Supreme Court of the United States.

Tankleff's Petition for a Writ of Certiorari was filed on August 28, 2000 and it was docketed on August 30, 2000. We received the Petition on August 29, 2000.

STATEMENT OF THE CASE

This is a Conditional Cross-Petition for a writ of certiorari. We respectfully refer the Court to No. 00-327,

Tankleff's Petition for a Writ of Certiorari for a full recitation of the nature of the case.

After the District Court denied the petition for a writ of habeas corpus, Tankleff requested that the District Court issue a certificate of probable cause. On February 28, 1997, the Court granted Tankleff permission to appeal. In that Memorandum and Order the District Court referred to a certificate of appealability but did not address any of the requirements for such a certificate (J.A. 3790).

On appeal we maintained that the Circuit Court lacked jurisdiction because Tankleff needed to obtain a certificate of appealability and the District Court's decision did not fulfill those requirements. Tankleff, in his Reply Brief, argued that the District Court plainly intended to certify all of the issues for further review.

The Circuit Court directly addressed this issue and held that although the request for a certificate of appealability came after the effective date of the Antiterrorism and Effective Death Penalty Act, this case only required a certificate of probable cause. The Circuit Court then decided that the certificate was sustainable as a certificate of probable cause. The Circuit Court, therefore, did not determine if the certificate was sufficiently specific to satisfy the new statutory requirements.

ARGUMENT

The Circuit Court's decision directly contradicts the holding of *Slack v. McDaniel*, ___ U.S. ___, 120 S.Ct. 1595,

146 L.Ed.2d 542 (2000). In *Slack*, the Court held that revised 28 U.S.C. § 2253 governed a request to appeal from the denial of a petition for a writ of habeas corpus when the petition was filed before the effective date of the AEDPA but the request for leave to appeal came after the effective date of the AEDPA. The procedural posture in *Slack* is identical to the procedural posture of this case.

In the Circuit Court we argued that Tankleff could not establish that he was denied any constitutional right. According to the provisions of 28 U.S.C. § 2253(c) an unsuccessful habeas corpus petitioner must obtain a certificate of appealability in order to further pursue collateral post-judgment relief. The application for a certificate of appealability is first made in the District Court and it can be renewed in the Circuit Court if the first decision is adverse to the applicant. 28 U.S.C. § 2253(c)(1). In order to obtain a certificate of appealability the applicant must make a substantial showing that he was denied a constitutional right. 28 U.S.C. § 2253(c)(2). The substantial showing required by § 2253(c)(2) is the codification of the standard established in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and is the same standard which was used to evaluate the old certificate of probable cause. *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996).

Under the old certificate of probable cause framework an appellant needed to make a substantial showing that the overall petition indicated the denial of a constitutional right. A certificate of probable cause could, however, be limited to certain issues, and the Circuit Court usually respected any limitation established by the District Court. *Vicaretti v. Henderson*, 645 F.2d 100 (2d Cir. 1980), *cert. denied*, 454 U.S. 868 (1981); *Barber v. Scully*, 731

F.2d 1073, 1075 (2d Cir. 1984). A certificate of appealability differs from a certificate of probable cause in this regard. Thus, a certificate of appealability *must* indicate which specific issue or issues satisfy the substantial showing requirement. 28 U.S.C. § 2253(c)(3); *see Federal Habeas Corpus Practice and Procedure*, Liebman and Hertz, 2d Ed., 1996 Cumulative Supplement, p. 285.

Although the standard for obtaining further review remains the same, it must be applied within the context of the petitioner's burden of persuasion. Now, according to 28 U.S.C. § 2254(d)(1) and (2), a habeas corpus petitioner cannot prevail unless he demonstrates that the State court decision on the issue presented was based on an unreasonable determination of the facts or that it relies on an unreasonable application of Federal law. Thus, in order to make the substantial showing required to obtain a certificate of appealability, the petitioner must establish that the District Court incorrectly decided that the State court decisions were reasonable. Furthermore, because the provisions of 28 U.S.C. § 2253(c)(3) are mandatory, there is no jurisdiction for an appeal from the denial of a petition for a writ of habeas corpus unless the specific issues which meet the statutory requirement are delineated. Here, the certificate of appealability does not fulfill the statutory requirements.

The certificate of appealability issued in this case does not meet the mandatory requirements of 28 U.S.C. § 2253(c). Tankleff could not establish a substantial basis for further review of his habeas corpus petition and the Circuit Court was, therefore, without jurisdiction and the appeal should not have been heard.

This is a Conditional Cross-Petition and review is appropriate only if Tankleff's petition is granted. We request that Tankleff's petition be denied. If, however, his petition is granted, we request that the Conditional Cross-Petition be granted. If both petitions are granted, the Court should dismiss the appeal and deny the writ. The proceedings subsequent to granting the certificate of appealability establish that Tankleff was not denied any constitutional right. Further litigation is unwarranted.

CONCLUSION

THE CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED IF THE PETITION FOR A WRIT OF CERTIORARI IS GRANTED.

DATED: Riverhead, New York

September 29, 2000

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

_____X

MARTIN H. TANKLEFF,

Plaintiff,

-against-

D. A. Senkowski, et al.,

Defendants.

_____X

MEMORANDUM AND ORDER

96-CV-0507 (TCP)

PLATT, District Judge.

With the benefit of "Monday morning quarterbacking" and able lawyers associated with experienced, large law firms, it is not difficult for any criminal defendant in a "high profile" case to magnify the significance and "importance" of one or more "close calls" in pre-trial and trial proceedings and make respectable arguments as to their constitutional validity in a habeas corpus (post jury trial) proceeding which might find acceptability in arenas removed from reality but not otherwise.

Defendant did so here recently and this Court gave defendants pleas in depth, careful and thoughtful consideration notwithstanding the fact that the seven highly esteemed members of our State's Court of Appeals, three highly esteemed members of the our Appellate Division, Second Department and a very respected member of the Suffolk County Supreme Court had carefully reviewed, considered and denied defendant's motions.

As pointed out in our Memorandum and Order dated January 29, 1997, the factual findings of our State courts are "presumed to be correct."

The State Supreme Court Justice (Tisch, J.) not only was in the best position to evaluate the testimony and to determine the "custodial" question, but also, most importantly, was in the best position to hold that the defendant's statements to the police were voluntary, reliable and corroborated. These were not ordinary murders; they were beatings and stabbings to death of a mother (matricide) and father (patricide), who the police found on their arrival at the scene to be in the presence of their son (the defendant) who was soiled with blood.

Normal behavior on the part of the son would not follow the pattern that occurred here culminating in a full confession after *Miranda* warnings.

Appropriate professional behavior on the part of the police, on the other hand, would have followed the practice that occurred here. There was no leap to a premature conclusion, there was an opportunity given to a possible suspect away from the highly charged, stressful scene to offer whatever explanation he wished to give and there was a test made of his explanation which revealed to the son the futility of his position. Thereafter, the arrest was made, warnings were given and a voluntary confession was given by the son which was corroborated by the scene at the crime itself.

Moreover, there is nothing to show that (i) the failure to give a *Batson* hearing with respect to the peremptory challenges, (ii) the failure to furnish information allegedly required under *Brady v. Maryland*, 373 U.S. 83,

85 (1963), as to prior conduct of the person whose only accuser was the defendant prior to his voluntary confession or (iii) the prosecutor's comments about the failure to call a sister who might normally have been expected to be supportive of the defendant as one who would not kill their mother and father, would have affected the jury's verdict in this case. The only one of these three grounds that falls squarely within the "close call" category is whether the failure of the police to turn over to the defense the so-called Hell's Angels information that some ten years before the trial Jerry Steuerman (who defendant said was the killer in this case) had hired Hell's Angels to beat up labor union workers who were harming his business. Mr. Steuerman was called as a Government witness who did not implicate the defendant as the perpetrator but did testify he himself "would never do anything like that." *Arguably,* hiring the Angels to beat up people was "[something] like that" and, hence, impeachable material both as to Mr. Steuerman and the adequacy of Detective McCready's investigation but *equally arguably* the hiring of someone to commit violent acts (a cowardly act) was totally inconsistent (i.e. not a similar act) with the personal cold blooded killing of the defendant's parents.

On balance, it is difficult to say with any degree of certainty that this information would have affected the jury's verdict in this case with the confession by this sophisticated above average high school defendant and his abnormal behavior and responses to the police prior to his arrest. The State Court Judges whose findings "are presumed to be correct" said "no" and if there is any meaning to the presumption this Court should and does agree.

It should be quite clear from the foregoing that this Court feels that the three State Courts should be sustained and that there are, at best, arguments that there is a substantial basis for granting a certificate of appealability. Nonetheless, given the importance of the case and extent of the sentence which was virtually mandated by the verdict, defendant's motion for such a certificate is hereby, granted.

SO ORDERED.

/s/ _____
District Judge, U.S.D.C.

Dated: Uniondale, New York
February 28, 1997

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No. 00-519

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SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY,
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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Following denial of his application for a writ of habeas corpus, Marty Tankleff submitted a motion for a "certificate of appealability" to the United States District Court for the Eastern District of New York. *See* Motion for Certificate of Appealability, filed February 12, 1997.[1] The memorandum in support of the motion and the draft order accompanying it specified four issues for which the certificate was sought, including the *Miranda* issue, and specifically requested certification with respect to "each of the issues." Memorandum of Points and Authorities at 7, Draft Order at 1. In a Memorandum and Order specifically discussing all four issues, including the *Miranda* issue, the District Court held that "defendant's motion for such a certificate is hereby, granted." *See* Cross-Pet. App. at 4a. The Order explicitly stated that it was "granting a certificate of appealability." *See id.*

Before the Second Circuit below, cross-petitioners argued that Marty had not satisfied the requirements for a certificate of appealability. The Second Circuit did not reach that question because it held that a certificate of appealability was not necessary when a habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. *See* Petitioner's main brief, No. 00-327 ("Pet.") App. at 8a-9a. The Second Circuit then evaluated Marty's appeal under the pre-existing "certificate of probable cause" caselaw established by this Court's decision in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and found that his "claims clearly satisfy this standard." Pet. App. at 9a. Since this Court's decision last Term in *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595 (2000), makes it clear that the same

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[1] The Cross-petition asserts that Marty requested a "certificate of probable cause." Cross-Petition ("Cross-Pet.") at 2. This is simply false.

substantive "*Barefoot*" standards apply under the AEDPA, the conditional cross-petition is much ado about nothing.

REASONS FOR DENYING THE WRIT

I.

THE CONDITIONAL CROSS-PETITION DOES NOT MERIT REVIEW

The conditional cross-petition fails to satisfy the considerations governing review on certiorari by this Court. In light of this Court's decision in *Slack*, the Second Circuit's holding that a certificate of appealability was unnecessary was concededly an error, albeit a clearly harmless error. But this Court does not sit to correct errors in individual cases, let alone harmless ones. *See* Supreme Court Rule 10.

Through its decision in *Slack*, this Court has already decided the federal question of law underlying cross-petitioners' argument. The subsequent application of *Slack* to the unique facts of an individual case hardly raises a "cert-worthy" issue.[2] At bottom, the Second Circuit did not literally apply the AEDPA to Marty's case based on a mistaken belief that it was not required to do so, but it then effectively did the same thing by applying the same substantive standards to the case. This scenario does not present any legal issue that is worth this Court's time and attention to resolve.

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[2] This is particularly true when the underlying decision, as here, was actually rendered before *Slack* was even decided and therefore self-evidently poses no direct challenge to its application.

II.

THE SECOND CIRCUIT PROPERLY CONSIDERED MARTY'S APPEAL

Although the Second Circuit held that a certificate of appealability was not required, there can be no genuine dispute that Marty in fact received a proper certificate of appealability under 28 U.S.C. § 2253(c)(2). The district court's order expressly stated that it granted a certificate of appealability, and it plainly complied with the statutory requirement that such a certificate "shall indicate which specific issue or issues satisfy the showing required." 28 U.S.C. § 2253(c)(3). As discussed above, the papers in support of the motion for a certificate of appealability specified four issues for which the certificate was sought. And the memorandum and order issued by the District Court discussed all four of those issues and "granted" the "defendant's motion for such a certificate." Cross-Pet. App. at 4a. The District Court obviously intended to and did certify each of the issues raised in Marty's application for a certificate of appealability.[3]

Moreover, the Second Circuit's ruling that the appeal was proper made clear that the district court's certificate satisfied the legal standard required for a certificate of appealability. As cross-petitioners concede in their brief, in order to obtain a certificate of appealability under this statute, and under *Slack*, the applicant must "make a substantial showing that he was denied a constitutional right . . . *[which] is the same standard which was used to evaluate the old certificate of*

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[3] Cross-petitioners' comments regarding 28 U.S.C. § 2254(d), *see* Cross-Pet. at 4, are not relevant to the validity of a certificate of appealability. That section pertains only to review of a habeas petition on the merits. In addition, § 2254(d) would not apply to Marty's case because his petition was filed on February 7, 1996, prior to the effective date of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

probable cause." Cross-Pet. at 3 (emphasis added). The Second Circuit below evaluated Marty's application under exactly this standard, holding that:

> Tankleff's claims clearly satisfy this standard: we have determined that Tankleff's *Batson* claim has substantial merit; the Appellate Division split three-to-two on both the *Miranda* question and the propriety of the prosecution's summation; and the district court thought that the *Brady* issue was a "close call." It follows that Tankleff's claims are all properly before this court.

Pet. App. at 9a-10a. Thus, although the Second Circuit used the wrong terminology ("certificate of probable cause" as opposed to "certificate of appealability"), its analysis of the issues made clear that Marty's appeal satisfied the correct substantive standard.

Further, the Second Circuit ultimately found on the merits that Marty had indeed been denied his *Miranda* rights by the Suffolk County detectives who interrogated him in this case. That Court also found that Marty had established a *prima facie* case that his *Batson* rights were violated in the state proceedings. These were the claimed violations of constitutional rights on which Marty actually prevailed in the Second Circuit. As a matter of logic, nothing further need be required to establish the legitimacy of his appeal to that Court.

Finally, even if there had been some technical deficiency in the certificate of appealability granted by the district court, the Second Circuit would have had the power to grant a certificate of appealability itself. *See Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997), *abrogated on other grounds sub nom., United States v. Perez*, 129 F.3d 255 (2d Cir. 1997). Thus, as Marty argued before the Second Circuit, if that court had any doubt as to which issues were certified

for appeal, it could itself have certified any or all of them. *See* Petitioner's Reply Brief at 2 n.2, filed May 28, 1997. Given the Second Circuit's statements regarding the existence of probable cause for appeal as well as its ultimate resolution of the appeal, there can be no question that the Court would indeed have issued such a certificate itself if it believed the case presented a need for it to do so. It is plain from the face of the Second Circuit's opinion below that it viewed all four issues to have met the standard of 28 U.S.C. § 2253(c)(2). *See* Pet. App. at 9a-10a (discussing why each of the four issues merits review under the identical standards from *Barefoot v. Estelle*). And there is no warrant for this Court to review that fact-bound determination.

In sum, the Second Circuit's only mistake was failing to anticipate this Court's holding in *Slack*. But if the Second Circuit had anticipated *Slack*, the outcome of this case would have remained the same, for Marty was clearly entitled to – and had in fact received – a proper certificate of appealability. Thus, even if the type of error-correction sought by the cross-petition were a proper use of this Court's certiorari jurisdiction, this would not be a proper case for exercising it, because correcting the error would not change the outcome. Regardless of *Slack*, the Second Circuit had jurisdiction to decide the *Miranda* issue, as does this Court.

CONCLUSION

The conditional cross-petition should be promptly denied.

Respectfully submitted.

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October 27, 2000